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Supreme Court, U.S.
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96-967
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF NEW YORK,

Petitioner,

- v. -

ALFONSO OWENS,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE APPELLATE DIVISION,
FIRST DEPARTMENT

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April 4, 1997

2/12

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STATE OF NEW YORK,

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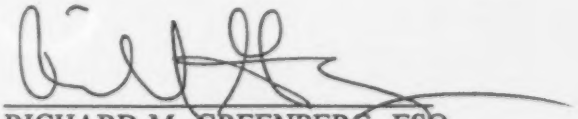
ALFONSO OWENS,

Respondent,

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Alfonso Owens, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari, and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the Supreme Court of the State of New York, in the Appellate Division of the Supreme Court of the State of New York, and in the Court of Appeals of the State of New York. Respondent's declaration in support of this motion is attached hereto.



RICHARD M. GREENBERG, ESQ.
Attorney for Respondent

DECLARATION

I, Alfonso Owens, do hereby declare and state that I am the Respondent in the above-entitled case; that in support of my motion to proceed as a poor person, I state that because of my poverty I am unable to pay the costs of said case; and that I believe I am entitled to redress.

I further state that the statements which I have made below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am presently employed. I earn approximately $850 per month. I work at S&S Apparel Corp., 225 W. 35th St., New York, NY 10001.

2. I have not received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or any other like source.

3. I have no cash reserves, nor do I have a checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or any other valuable property.

5. There are no persons who are dependent upon me for support.

I declare under penalty of perjury that the foregoing is true and correct.

4/2/97
Date

Alfonso Owens
Alfonso Owens

No. 96-967

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STATE OF NEW YORK,

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- v. -

ALFONSO OWENS,

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

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April 4, 1997

COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court issue a writ of certiorari to review a determination of an intermediate state court holding, consistent with every state or federal appellate court that has ever directly addressed the question, that where a defendant's conviction is reversed on appeal due to legally insufficient evidence of the only offense charged to the jury, the Double Jeopardy Clause of the United States Constitution bars retrying the defendant for any lesser-included offense?

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COUNTER-STATEMENT OF THE CASE

A. Introduction

By a single-count indictment alleging robbery in the first degree, see N.Y. Penal Law § 160.15(4) (McKinney 1988), Alfonso Owens was charged with the robbery of a Manhattan bar. After trial, Mr. Owens was convicted of first-degree robbery -- the only offense that the prosecution elected to submit to the jury. On appeal, the Appellate Division reversed the conviction, holding that the evidence was legally insufficient to support that charge. People v. Owens, 203 A.D.2d 106, 610 N.Y.S.2d 485 (N.Y. App. Div.), leave denied, 84 N.Y.2d 871, 618 N.Y.S.2d 16 (1994).

Thereafter, Mr. Owens was reindicted and charged with the very same conduct at issue in the earlier trial. The second indictment, however, alleged not first-degree robbery, but its lesser-included offense of robbery in the third degree. See N.Y. Penal Law § 160.05 (McKinney 1988). After the trial court dismissed this indictment on double jeopardy grounds, the Appellate Division affirmed, People v. Owens, ___ A.D.2d ___, 642 N.Y.S.2d 874 (N.Y. App. Div. 1996), and the Court of Appeals declined to grant leave, People v. Owens, 88 N.Y.2d 991, 649 N.Y.S.2d 398 (N.Y. 1996). The state now petitions this Court for a writ of certiorari.

B. The First Indictment and Appeal

At trial upon the first indictment, after the court invited the parties to submit any "requested charges" to the jury, the prosecutor declined to request that the jury be charged on the lesser-included offense of robbery in the third degree. Thus, in its deliberations, the jury was faced with just two choices: it could convict Mr.

Owens of robbery in the first degree or it could acquit him outright. The jury ultimately found Mr. Owens guilty of first-degree robbery -- the only offense it considered.

On appeal, the Appellate Division found that the evidence at trial was "insufficient to sustain the conviction for robbery in the first degree." 203 A.D.2d at 107, 610 N.Y.S.2d at 487. Because "an element of the crime -- that defendant employ a firearm or what appears to be a firearm -- [was] not supported by the record," the court held that the jury's verdict could not be sustained. Id. Without considering the double jeopardy implications of its ruling, however, the court opined that the evidence at trial was "sufficient to sustain a conviction for robbery in the third degree," id., and granted the state "leave to re-present the charge of robbery in the third degree to a Grand Jury," id. at 106, 610 N.Y.S.2d at 486.

C. The Second Indictment and Appeal

Based on precisely the same conduct as was alleged in the first prosecution, Mr. Owens was reindicted and charged with the crime of robbery in the third degree. Thereafter, he moved to dismiss on both state and federal double jeopardy grounds. Had the jury acquitted him of first-degree robbery, Mr. Owens argued -- the only charge that the prosecutor elected to submit -- the state would have been precluded from later prosecuting him for the lesser-included offense of third-degree robbery. See Brown v. Ohio, 432 U.S. 161, 168 (1977) (lesser-included offense considered "same offense" for double jeopardy purposes as its greater-inclusive offense). Moreover, he argued, the Appellate Division's holding, that the evidence was legally insufficient to support the only charge submitted to the jury, was

tantamount to acquittal of that offense within the meaning of double jeopardy law. See Burks v. United States, 437 U.S. 1, 19 (1978). Therefore, just as a jury verdict finding Mr. Owens not guilty of first-degree robbery would have barred further prosecution for the "same offense" of third-degree robbery, so too was the effect of the Appellate Division's finding that the evidence of first-degree robbery was legally insufficient.

The trial court granted Mr. Owens's motion to dismiss on those grounds. The Appellate division affirmed, and the Court of Appeals denied leave.

REASONS FOR DENYING THE WRIT

This Court should not grant a writ of certiorari because there is no split of authority with respect to the issue raised in this case. While the petition invokes the specter of a "fundamental split" among the several states, Pet. 4, petitioner fails to cite a single authority that both directly addresses the issue at stake here and resolves it in a way different from that of the courts below. This is not surprising, however, because the decision in this case squarely conforms with bedrock principles of double jeopardy law. Moreover, the issue raised is one that does not arise frequently. For these reasons, this Court should deny the requested writ.

First, the petition completely mischaracterizes the nature of this case. As petitioner would have it, the "controlling issue" is whether double jeopardy principles bar retrial "of a defendant whose conviction has been reversed for insufficiency of an aggravating element of the crime, if a lesser included crime had been proved beyond a reasonable doubt." Pet. 4. While that question may be an interesting one -- it is not the question presented by this case. The critical fact here, which petitioner ignores, is that the lesser-included crime, at the prosecutor's election, was never even submitted to the jury at trial. The issue in this case, therefore, is whether double jeopardy principles bar retrial of a defendant whose conviction has been reversed for insufficiency of an aggravating element of the crime, where the lesser-included crime was never presented to the jury in the first instance. Those courts that have directly addressed this issue have uniformly held that double jeopardy bars retrial on the lesser-included offense.

Here, the first indictment charged Alfonso Owens with just one count: robbery in the first degree. At trial upon this indictment, the prosecutor made the tactical decision, see N.Y. Crim. Proc. Law § 300.50(1) and (2) (McKinney 1993) (trial court must honor request by either party to submit "lesser included" offense to jury, where supported by "reasonable view of the evidence"), to submit this singular charge to the jury, unaccompanied by the lesser-included offense of robbery in the third degree. Had the jury then acquitted Mr. Owens of first-degree robbery -- the only charge before it -- there can be no doubt but that the guarantee against double jeopardy would have barred recharging Mr. Owens with third-degree robbery. See Brown v. Ohio, 432 U.S. 161, 168-69 (1977) ("invariably true" that greater offense will always be "the 'same' for purposes of double jeopardy as any lesser offense included in it").

Similarly, once the Appellate Division found that the evidence was insufficient to support the only charge before the jury, that court's dismissal of the indictment was tantamount to acquittal of the charge, Burks v. United States, 437 U.S. 1, 19 (1978), and was thus entitled to the same preclusive effect as the decision that, in essence, the appellate court held the jury should have made. See Tibbs v. Florida, 457 U.S. 31, 41 (1982) ("A reversal based on the insufficiency of the evidence has the same effect [as an acquittal] because it means that no rational factfinder could have voted to convict the defendant."). As this Court explained in Lockhart v. Nelson, 488 U.S. 33 (1988):

> Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the

> defendant who obtains an appellate determination that the trial court should have entered a judgment of acquittal. The fact that the determination of entitlement to a judgment of acquittal is made by the appellate court rather than the trial court should not . . . affect its double jeopardy consequences; to hold otherwise "would create a purely arbitrary distinction" between defendants based on the hierarchical level at which the determination was made.

488 U.S. at 39 (citing Burks, 437 U.S. at 10-11) (emphasis in original). These principles apply in this case. Where, as here, the jury had only one count before it -- which count was not supported by legally sufficient evidence -- double jeopardy principles bar reprosecution for any lesser-included offense.

To be sure, had the jury in fact been presented with both robbery in the first degree and robbery in the third degree, there would have been no bar to reindictment for third-degree robbery following appellate dismissal of the greater offense. Under those circumstances, had the jury rendered a guilty verdict on the higher charge, it would have essentially suspended its deliberations prematurely. Were that charge found (on appeal) to have been lacking in evidentiary support, it would have been entirely proper to retry the defendant on the lesser charge -- placing him in precisely the position he would have been in, had the jury properly disposed of the higher charge and then proceeded to consider the lesser one. See, e.g., People v. Mayo, 48 N.Y.2d 245, 422 N.Y.S.2d 361 (N.Y. 1979) (where defendant was charged with robbery in the first degree, and jury was submitted lesser-included offenses of robbery in the second- and third-degrees, reindictment of defendant for lesser offenses after evidence of greater offense was found legally insufficient did not constitute double jeopardy).

This, however, was not such a case. Here, Mr. Owens was indicted solely for first-degree robbery, and the jury was charged only on that offense. Because it had no authority to even consider the lesser-included offense, the jury was confined to just two choices: guilty of first-degree robbery or outright acquittal. Once the appellate court held that the jury's verdict should have been one of acquittal, double jeopardy principles required that the appellate court's determination be given the same preclusive effect as the jury verdict that should have been rendered in the first place. Lockhart, 488 U.S. at 39.

Those jurisdictions that have addressed this issue have uniformly concluded that the guarantee against double jeopardy bars retrial for a lesser-included offense, not submitted to the jury, following appellate reversal of the greater offense due to insufficient evidence. See Ex Parte Roberts, 662 So. 2d 229, 232 (Ala. 1995); Ex Parte Beverly, 497 So. 2d 519, 524-25 (Ala. 1986); Webster v. State, 549 So. 2d 784, 785 (Fla. 4th Dist. Ct. App. 1989); Granger v. State, 850 S.W.2d 513, 519-20 (Tex. Crim. App. 1993); Stephens v. State, 806 S.W.2d 812, 816-18 (Tex. Crim. App. 1990), cert. denied, 502 U.S. 929 (1991). The key to each of the above decisions is the fact that the jury in the first instance was not charged upon the lesser-included offense.

In Beverly and Stephens, moreover, the courts found it particularly significant that the prosecution -- just like the prosecution in Mr. Owens's case -- "simply chose not to pursue a conviction for [the lesser] offense . . . . [by failing to] request[] the additional instruction." Beverly, 497 So. 2d at 525; see Stephens, 806 S.W.2d at 818 ("[b]y electing to proceed only on the greater offense, the State can

hardly claim that it did not contribute to the error"). See also Saylor v. Cornelius, 845 F.2d 1401, 1408 (6th Cir. 1988) ("no reason why the prosecution should be allowed to try a defendant again merely because it did not realize during the trial that the only theory of liability established by the evidence had not been charged to the jury").

Notwithstanding the above, petitioner cites a string of authorities, both state and federal, purportedly holding that double jeopardy principles do not forbid the reprosecution of a defendant in the circumstances of this case. Pet. 7-8. Yet none of these cases directly addresses the issue at stake here. Indeed, most of the cited authorities are completely inapposite because, unlike the instant case, the juries in those cases were charged with lesser-included offenses at the defendants' first trial, making retrial on such offenses permissible, as discussed above. See Beverly v. Jones, 854 F.2d 412, 415 (11th Cir. 1988) ("jury was instructed on the lesser included offense of murder"), cert. denied, 490 U.S. 1082 (1989); Dickenson v. Israel, 482 F. Supp. 1223, 1224 (E.D. Wis. 1980) ("jury was instructed on the elements of armed robbery and the lesser-included charge of robbery"), aff'd on opinion below, 644 F.2d 308 (7th Cir. 1981); State v. Maupin, 859 S.W.2d 313, 315 (Tenn. 1993) ("the jury was charged on the crimes of aiding and abetting child abuse murder in the first degree, . . . second degree, . . . aggravated child abuse, and . . . child abuse"); State v. O'Brien, 857 S.W.2d 212, 217 (Mo. 1993) (en banc) (jury instructed on murder in first degree and four different theories of murder in the second degree); Gorham v. Commonwealth, 15 Va. App. 673, 426 S.E.2d 493, 494 (Va. Ct. App. 1993) (trial judge "submitted the case to the jury with both felony and

misdemeanor instructions"); People v. Robare, 109 A.D.2d 923, 923-24, 486 N.Y.S.2d 393, 394 (N.Y. App. Div. 1985) (trial court charged jury on robbery in the third, second and first degrees).

Most of the other cases cited by petitioner simply do not disclose, one way or the other, whether the first-trial jury was charged with any lesser offense. See State v. Malufau, 80 Haw. 126, 906 P.2d 612 (Haw. 1995); People v. Youngblood, 210 A.D.2d 948, 621 N.Y.S.2d 265 (N.Y. App. Div. 1994); People v. Sanchez, 209 A.D.2d 265, 618 N.Y.S.2d 770 (N.Y. App. Div. 1994), leave denied, 624 N.Y.S.2d 385 (N.Y. 1995); State v. Garcia, 114 N.M. 269, 837 P.2d 862 (N.M. 1992); State v. Alston, 26 N.C. App. 418, 216 S.E.2d 416 (N.C. Ct. App. 1975).[1/] Because these cases therefore do not address the issue at stake in this case, they obviously fail to take a position contrary to that advanced by the courts below.

Finally, petitioner's citation to People v. Ryan, 82 N.Y.2d 497, 605 N.Y.S.2d 235 (N.Y. 1993), is also unavailing. Although Ryan indeed contemplated the defendant's retrial upon a lesser offense that was not submitted to the jury at the first trial, Ryan never even considered or addressed the question of double jeopardy, much like the first decision of the Appellate Division in this case. See Owens, 203 A.D.2d at 106-07, 610 N.Y.S.2d at 485-87. Nor did it have to, since there would have been no double jeopardy problem unless and until the state exercised its independent judgment to reprosecute. Indeed, that is precisely what happened in this

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1/ Alston is additionally unpersuasive authority because it was decided prior to this Court's holding in Burks that the Double Jeopardy Clause bars retrial following appellate reversal for insufficiency.

case: the very same appellate panel that had earlier given the state "leave to re-present" the charge of third-degree robbery, 203 A.D.2d at 106, 610 N.Y.S.2d at 486, later held -- when squarely presented with the double jeopardy issue -- that reprosecution was forbidden. 642 N.Y.S.2d at 874. In sum, the "fundamental split" alluded to in the petition, Pet. 4, exists only in petitioner's imagination.

Lacking authority for the issue at stake in this case, petitioner cites the Court's recent decision in Rutledge v. United States, ___ U.S. ___, 116 S. Ct. 1241, 1250 (1996), for the proposition that appellate courts "may direct entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." Pet. 5-6. First of all, Rutledge expressly declined to identify the limits of an appellate court's power "to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense." 116 S. Ct. at 1250. To the extent that Rutledge did condone the practice, moreover, it is clear that the Court contemplated those circumstances in which the jury had been charged with the lesser-included offense at the first trial. See id. at 1250 n.16 (noting that "[a] jury is generally instructed not to return a verdict on a lesser included offense once it has found the defendant guilty of the greater offense").

Rutledge is thus entirely consistent with the notion that double jeopardy principles forbid a reviewing court from entering judgment against a defendant for a lesser-included offense that the jury never had before it. Indeed, this was precisely the holding of the Ninth Circuit in United States v. Vasquez-Chan, 978 F.2d 546 (9th Cir. 1992). Agreeing that appellate entry of judgment for a lesser offense is proper in some instances, that court held, based upon an analysis of the decisions of other

circuits, that among the conditions precedent to the entry of such judgment is that "the jury must have been explicitly instructed that it could find the defendant guilty of the lesser-included offense and must have been properly instructed on the elements of that offense." Id. at 554. Accordingly, "[i]f no such lesser-included offense instruction is given," the court held, "the acquittal (whether at trial or on appeal) on the greater offense precludes a conviction on a lesser offense." Id. at 554 n.5 (parenthetical in original). In the present case, of course, the reviewing court did not simply modify the conviction to one for a lesser offense, but instead remanded the case with leave to initiate an entirely separate proceeding. If double jeopardy principles proscribe the former, see Vasquez-Chan, 978 F.2d at 554 (citing cases), then, a fortiori, they proscribe the latter. See Schiro v. Farley, 510 U.S. 222, 230 (1994) ("the primary evil to be guarded against is successive prosecutions").

Finally, petitioner cites 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 24.4(b), at 91-92 (1984), for the proposition that when there has been both a general trial error as well as a finding of sufficient evidence in support of the lesser-included offense, it is proper to remand for retrial on the lesser offense. Pet. 6-7. Again, the problem is that the authority cited does not address the circumstance at issue here -- in which the jury in the first trial has not been instructed on the lesser-included offense. Moreover, the one case cited by LaFave & Israel regarding retrial on a lesser-included offense after appellate reversal, see id. at 92 n.35 (citing Moss v. State, 574 S.W.2d 542 (Tex. Crim. App. 1978)), was subsequently overruled by a case holding that double jeopardy indeed bars retrial for an offense upon which the jury was not instructed in the first proceeding. See

Stephens v. State, 806 S.W.2d 812, 830-31 (Tex. Crim. App. 1990) (McCormick, P.J., dissenting) (faulting majority for overruling Moss).

Petitioner thus fails to procure a single authority, from any jurisdiction, that conflicts with the double jeopardy holding in this case. To the contrary, all jurisdictions that have confronted this issue have resolved it in precisely the same way as have the New York courts here. Far from being "fundamentally split," there is virtual unanimity among the courts that have considered this issue. Because the decision below was both sound and consistent with the unanimous body of precedent, this Court should not grant the requested writ.

Finally, it is not often that an appellate court will reverse a conviction on the grounds that the evidence below was legally insufficient. A mere subset of that already small group are those insufficiency cases in which, at trial, the jury was not even charged on any lesser-included offense. In short, the circumstances of this case arise infrequently, at best. For this reason as well, the Court need not grant the writ.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be denied.

Respectfully submitted,

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